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In the
Supreme Court of the United States

OCTOBER TERM, 1921.

No. 195.

CARLISLE PACKING COMPANY,
Petitioner,

vs.

OLE SANDANGER,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF OF PETITIONER.

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STATEMENT OF THE CASE.

The Record.

This case is before the Court on a writ of certiorari to the Supreme Court of Washington to review a judgment of that Court which affirmed a

judgment of the Superior Court of the State of Washington for King County.

The respondent, Sandanger, instituted an action against the petitioner, the Carlisle Packing Company, to recover damages for personal injuries alleged to have been sustained by him on the 7th of March, 1917, through the negligence of the petitioner, while he was employed as a seaman on one of the motor boats of the petitioner near Cordova, Alaska.

The case was tried before a jury, which on the 11th of September, 1918, returned a verdict in favor of the plaintiff for $7,175. (Rec. p. 30). The trial court thereafter, with the consent of the plaintiff, reduced this verdict to $4,175, and entered judgment thereon. (p. 34).

The case was taken on appeal to the Supreme Court of the State of Washington, which court on the 14th of September, 1920, affirmed the judgment of the trial court. (p. 159). The opinion of the State Supreme Court (p. 159) is reported in 112 Wash. 480.

The petition of the Carlisle Packing Company for a rehearing and hearing *en banc* was denied by the Supreme Court of the State of Washington, on the 17th of November, 1920 (p. 166). Thereafter the petitioner filed its petition in this court for a writ of certiorari to the Supreme Court of the State of Washington, which was granted on the 24th of January, 1921. (p. 366.)

Questions Involved.

The substantial questions involved in this case are:

(First) Whether, if the master of a gasoline launch negligently fills with gasoline instead of kerosene a can used on the launch to aid in starting fires in the galley, (and the evidence is conflicting whether the can was not in fact filled with kerosene) this can be said to make the launch "unseaworthy" so that a seaman, who was burned from trying to start a fire with the contents of the can, may recover damages beyond the cost of his maintenance and cure on the theory that the owners are liable to an indemnity for his injuries in consequence of the unseaworthiness of the ship, and

(Second) Whether, in any event the owners could be liable beyond the value of the vessel and the freight money for the current voyage, under Section 4283 Revised Statutes.

The Facts.

The respondent Ole Sandanger is a resident of the State of Washington. The petitioner is a corporation created and existing under the laws of the State of Washington, with its general offices in Seattle. It owns and operates a salmon cannery near Cordova, Alaska, in connection with which, it owns and operates several motor boats.

The respondent Ole Sandanger was an employee of the packing company in and about its cannery near Cordova from the 13th of February, 1917, until the 7th of March, 1917. He had been employed part of the time as an engineer on one of the company's small boats, the C. P. C. 2, a gasoline launch about twenty-eight feet long, of about three tons capacity with an enclosed cabin forward, in which there was a motor near the middle, a bunk and bench along one side, and a bench along the other side on which sat a small sheet-iron wood burning stove (pp. 80, 82, 174, 144, 136).

On the 7th of March, Sandanger was one of three members of the crew aboard this boat which left the cannery about seven o'clock in the morning, in charge of Iver Stensland as Captain (p. 181). They went for some sand to be used in concrete construction work at the cannery (p. 136). They travelled some twenty miles southwesterly to Boswell Bay, where they loaded their sand, leaving there about twelve o'clock (p. 140). Shortly after leaving, Captain Stensland and Isaac Utness, the Engineer, prepared the noon meal for the crew and served it on the deck of the vessel (pp. 140, 180, 85). After the crew had finished their meal they cruised along on their way home, spending from an hour and a half to two hours at leisure shooting at wild ducks and eagles (pp. 141, 182).

There is considerable conflict in the evidence as to just what time the noon meal was prepared and served, and as to the length of time that elapsed

between the time the noon meal was finished and the time Sandanger, the respondent, was instructed to light the stove in the cabin and heat water and wash the dishes. The time of preparing the noon meal is fixed between eleven o'clock and twelve o'clock (pp. 85, 100, 140, 180), the time spent at leisure is fixed from half an hour to two hours and a quarter (pp. 88, 102, 140, 182). At some time subsequent to the finishing of the noon meal the Captain directed Sandanger to go into the cabin and light a fire in the small sheet-iron stove, heat water, and wash the dishes. The time this order was given varies according to the testimony of the witnesses from near one o'clock to two o'clock (pp. 88, 102, 141, 182). Sandanger in starting the fire used part of the contents of a small can which sat in the cabin from four to six feet from the cook stove (pp. 87, 150, 191). This can ordinarily contained kerosene that was used to start the fire in the stove and to fill the lights and lanterns about the boat, and had the letters "Coal Oil" painted on it (pp. 92, 95, 148, 190).

On the day before, March 6th, Captain Stensland filled the can with kerosene from a fifty gallon drum in the oil house on the dock near the cannery (p. 149). That day he an Isaac Utness, the Engineer, had used part of the contents of the can to fill the lamps and lanterns on the boat and to start a fire to cook their noon and evening meals (pp. 86, 92, 148). The Captain's testimony is that the can had not been refilled on the day of

the 7th or subsequent to the time he filled it on the 6th with kerosene (p. 149).

Addenda, p. 6.

A witness for the respondent ~~defendant~~ testified on the other hand that the can was empty on the evening of the sixth; that there was no oil in it to light the lanterns. (p. 86)

The theory of the respondent's case is that the can on this day contained gasoline instead of kerosene, and that as a result of the negligence of the Packing Company in placing gasoline in the can instead of kerosene it became responsible for the full amount of his damage suffered. The complaint sets out this negligence in the following language (p. 2.):

> "That by reason of gross carelessness and negligence of the defendant in keeping side by side in its oil house drums of gasoline and kerosene with no distinguishing marks, and by reason of the carelessness of the defendant's employees, including the captain in charge of the boat, the kerosene can used by plaintiff had been filled with gasoline instead."

The kerosene was stored in a fifty or one hundred gallon drum in the oil house, and there is a conflict in the evidence as to whether or not there was another fifty or one hundred gallon drum stored there containing gasoline. If both, they were lying on a rack alongside each other (pp. 44, 62, 98, 112, 119, 149, 127, 176, 266). There is also

a conflict in the evidence as to whether or not these drums were properly marked to distinguish them. The petitioner's witnesses testify that the drum containing kerosene was painted white on the end and had the words "kerosene" or "Pearl Oil" painted on the side of the drum in conformity to the regulations of the Interstate Commerce Commission (pp. 112, 118, 123, 128, 149, 151). The respondent's witnesses testify that there were two drums and that there were no distinguishing marks on them (pp. 99, 45, 63, 177, 266).

There is expert testimony that kerosene will explode if poured on hot embers of a fire and then ignited with a match (p. 343), and the contention of the petitioner was that Sandanger poured kerosene from the gallon can on the smouldering embers remaining from the fire that had been previously kindled in the stove to cook the noon meal. The contention of the respondent is that the fire had completely gone out in the stove and it was stone cold, and that under the testimony of the experts only gasoline would explode under those circumstances when ignited. The testimony of the witnesses on the one side is that the stove must have been hot when Sandanger attempted to light a fire in it, and the testimony on the other side is that the stove was cold (pp. 146, 150, 188, 189).

After the accident occurred the boat proceeded on its way home and arrived there at or about three o'clock in the afternoon of the same day. Sandanger was immediately removed to the hos-

pital, where he was confined for about a month, after which he was employed as a gateman at the cannery until he left (pp. 205, 142).

The Packing Company paid all expenses of his treatment and care at the hospital, and paid him his wages through from the time of his original employment until he left the employ of the Company in July of that year (pp. 212, 282). The evidence discloses that he subsequently became indebted to the extent of $175.00 for additional expenses of cure after his return to Seattle upon completing his employment with the Packing Company (p. 282).

Federal Question Raised in Courts Below.

At the close of plaintiff's evidence on the trial of the case, and again at the close of all the evidence, the petitioner moved for a directed verdict in favor of the plaintiff and against the defendant for the admitted amount due the plaintiff for additional expenses of cure as a result of his injuries, amounting to $175.00. Both these motions were denied and exceptions allowed (pp. 324, 363). The petitioner after the denial of its motion for an instructed verdict requested the court to instruct the jury that the measure of respondent's damages should be limited to the amount of his wages for the period of his employment, his hospital and doctor's bills and expenses of his cure (pp. 17, 21).

The court refused such requested instructions and allowed an exception to the petitioner.

After the rendition of the verdict, the petitioner moved the court for a judgment *non obstante veridicto*, for the admitted amount due of $175.00 for additional costs of cure, which motion was in the alternative for a new trial. This motion was denied by the court, and an exception allowed (pp. 30-33).

The petitioner took the position in its several motions and requested instructions to the jury, that the respondent at the time of his injury was engaged in the performance of a maritime service upon the motor boat of the petitioner, and that having been paid in full for his services under his maritime contract for the fishing season covering a period of several months, likewise his doctor's bills, hospital charges and medical attendance until his return to Seattle from Cordova, the respondent could only hold the petitioner responsible in any event for the additional admitted amount due the respondent for costs of cure in the sum of $175.00, because the petitioner claimed immunity under Section 2, Article III, of the Constitution of the United States extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction; and under Section 8 of Article I of the Constitution of the United States, which gives Congress power to make all laws necessary and proper to carry into execution the powers vested in the government, or in any

department or officer thereof; and under Section 24 of the Judicial Code, which reads:

> "Sec. 24. The district courts shall have original jurisdiction as follows; * * *
>
> "Third, Of all civil causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it; * * * "

The petitioner claimed immunity from liability for any damages in excess of those damages allowed under maritime law as expounded by the admiralty courts in pursuance of the Constitutional and Congressional authority above mentioned. And the petitioner contended further that as the respondent had an election of remedies only, he could go into the common-law courts or into the admiralty courts for the redress of his wrongs, but that the amount of his recovery must be limited by the maritime law, regardless of the forum selected by him; that if the respondent had brought his action in the admiralty courts he would have been limited in his recovery to the wages of the voyage, his medical and hospital attendance and the cost of his cure, which the evidence established without contradiction at a sum not in excess of $175.00, and that when the respondent selected the common-law forum, he could recover no greater amount of damages than that

fixed by settled law of the admiralty courts (pp. 17-19, 30-33, 324-5, 361-3).

Petitioner throughout the progress of the case contended in the alternative that there could be no recovery under the Revised Statutes, Sections 4283 and 4289, in excess of $1500, the undisputed value of the vessel (pp. 18, 338).

In the Supreme Court of the State of Washington, orally and in its briefs, the petitioner urged the same limitation of liability under the Constitution and statutes of the United States and the decisions of the federal courts thereof (p. 163).

The Supreme Court of the State of Washington held that Sandanger's recovery might be sustained upon the theory that his injuries were received in consequence of the "unseaworthiness" of the boat upon which he was working, a negligent furnishing of gasoline in place of kerosene creating "unseaworthiness" in the eyes of the court, although if there was any negligence it was that of the master.

SPECIFICATION OF ERRORS.

Errors of the Superior Court for King County.

1. The court erred in denying petitioner's motion for an instructed verdict at the close of plaintiff's evidence. (p. 324.)

2. The court erred in denying petitioner's motion for an instructed verdict at the close of all the evidence. (p. 363.)

3. The court erred in denying appellant's motion for judgment *non obstante veredicto* and in the alternative for a new trial. (p. 30.)

4. The court erred in instructing the jury as follows (p. 21):

> "If on the other hand the jury believes from the evidence either that defendant did not place the two drums side by side in the oil house, or if they were so placed that the contents of each was properly designated on the outside of the drums, or if not so designated that an ordinarily careful employer, under the same circumstances would not so designate the contents of the drums, but if the jury at the same time finds that the foreman of defendant in charge of the boat, Iver Stensland, could before he filled the coal-oil can from the drum have by a simple test found out whether it was coal-oil or gasoline he filled the can with, and if the jury further finds that he did not before filling the can with gasoline, if you believe that he did in fact fill it with gasoline, make any such test, or in any manner try to find out what oil he got, and if the jury further believes that an ordinarily careful foreman or man in charge of the boat would not under the same circumstances, have filled the can or placed it where he did place it, without first finding out whether it was coal-oil or gasoline he filled the can with, then and in that

case the jury would be justified in finding said Stensland guilty of negligence, and if the jury believe that by reason of such negligence on Stensland's part plaintiff was, without any negligence on his own part, injured and burned, then in that event it should find a verdict for plaintiff in such sum as would fairly compensate him for the damages he sustained by reason of such injury so caused by said Stensland's negligence.

5. The court erred in instructing the jury as follows (p. 23):

"If you find under the evidence produced and under the instructions given you by the court that plaintiff is entitled to a verdict, then the amount which your verdict should give him becomes important. If entitled to a verdict at your hands at all the court instructs you that he is entitled to receive full and fair compensation. .....

"2nd. For all loss he has sustained in and to his earning capacity as a fisherman and mariner which earning capacity is by the pleadings admitted to be the sum of One Hundred Dollars ($100.00) per month, the compensation for loss under this head, however, not to exceed the sum of Two Thousand Dollars ($2,000), including any future loss to such earning capacity, if you under the evi-

dence find, that there is liable to be any future loss of earning capacity.

"3rd. Full and fair compensation for his suffering and for all pains of body and mind caused him by the injuries as well as for any and all temporary or permanent disfigurement, and for any temporary or permanent maiming of any members of his body, if you find there was any such, also for any other temporary or permanent injuries, which you should find that he has sustained, the damages under this head, however, not to exceed the sum of Eight Thousand Dollars ($8,000)."

6. The court erred in refusing to instruct the jury as follows (p. 17):

"If you find from the evidence in this case that Iver N. Stensland, at the time of the injury to the plaintiff on the 7th of March, 1918, was the master of the vessel upon which he was injured, and that the said Stensland filled the gallon can on the morning of the injury with gasoline instead of kerosene, and that the defendant had in its oil house at its cannery at Cordova a drum of kerosene and a drum of gasoline, side by side, and that Stensland by the exercise of ordinary prudence or by the exercise of the ordinary tests of smelling or by pouring the same in his hand, could have determined before he placed the oil in the

gallon can whether it was gasoline or whether it was kerosene, and failed to do so, and by mistake placed in the gallon can gasoline instead of kerosene, and subsequently placed the said gallon can in the cabin of the vessel and that the substitution of gasoline instead of kerosene in the gallon can was due to the negligence of said Stensland, and that the defendant company had no personal knowledge of the mistake or negligence of the said Stensland, then I instruct you that your verdict must be for the plaintiff, but in a sum not in excess of One Hundred Seventy-five Dollars ($175.00)."

7. The court erred in refusing to instruct the jury as follows (p. 18):

"The Congress of the United States has enacted a law providing that ship owners shall not be liable for any debts, obligations or liabilities arising on board a ship beyond the value of the ship and the freight money for the current voyage during which the debt or liability arose. You will first determine the value of the vessel of the defendant upon which the plaintiff was injured and the freight money, if any, that the vessel earned on the voyage upon which plaintiff was injured and under no circumstances can your verdict be for a sum in excess of such value of said vessel and freight money for said voyage."

8. The court erred in refusing to instruct the jury as follows (p. 18):

> "The seaworthiness of a vessel is defined to be in maritime law, the sufficiency of the vessel in materials, construction, equipment, officers, men and outfit for the trade or service in which it is employed, and if you find from the evidence in this case that the vessel of the defendant at the time she started upon the voyage upon which the plaintiff was injured was in a seaworthy condition as measured by the foregoing definition, then I instruct you that the plaintiff is limited in his recovery to not in excess of One Hundred Seventy-five Dollars. The test of seaworthiness is whether the vessel is reasonably fit to perform the service undertaken by the master, and if you find from the evidence in this case that the vessel upon which the plaintiff was injured was reasonably fit for the service intended at the commencement of the voyage, or that the defendant exercised due diligence in attempting to make her seaworthy for said voyage, then I instruct you that the plaintiff cannot recover in excess of One Hundred Seventy-five Dollars and your verdict must be in an amount not in excess of said sum."

Errors of the Supreme Court of the State of Washington.

9. The court erred in holding that Sandanger's recovery might be sustained upon the theory that his injuries were received in consequence of the "unseaworthiness" of the boat upon which he was working. (p. 166.)

10. The court erred in not reversing the case with instructions to enter a judgment for One Hundred Seventy-five Dollars, the unpaid cost of Sandanger's cure.

11. The court erred in holding, if Sandanger could recover indemnity for his injuries, that his recovery could exceed the value of the vessel and freight money for the voyage.

ARGUMENT.

(1) If under the Maritime Law, whether found in Federal statutes or in the decisions of Federal courts, the Carlisle Packing Company is not liable for damages to Sandanger in excess of his wages and expenses incident to curing him, then under Section 24 of the Judicial Code no greater damages can be recovered in a common law action in the State Court.

Under Article III, Section 2 of the Constitution extending the judicial power of the United States

to all cases of admiralty and maritime jurisdiction, and Article I, Section 8 empowering Congress to make all laws necessary and proper for carrying into execution the powers vested in the Government, the Federal Courts were given jurisdiction in matters of admiralty, and a body of maritime law has been promulgated by the Federal Courts under which the petitioner contends that it could not be liable to the respondent in the situation presented by case at bar for any sum in excess of $175, the admitted cost of the respondent's cure.

The respondent, however, did not bring suit in the Federal Courts, but sued in the State court under a proviso of Section 24 of the Judicial Code (36 Stat. L. 1091), as follows:

> "Sec. 24. The district courts shall have original jurisdiction as follows: * * *
>
> "Third: Of all causes of admiralty and maritime jurisdiction, saving to suitors in all cases the right of a common-law remedy where the common-law is competent to give it. * * * "

The first question, which was raised by petitioner at all stages of the proceedings in the courts below, and which is involved in all of the specifications of error, is whether, assuming that recovery in the Federal courts would be limited to the cost of cure, any greater measure of liability can be allowed by the State court. Clearly it cannot.

As the respondent saw fit to select the common-law forum to enforce his remedy he is of necessity limited to the liability prescribed by the admiralty courts, as said by this court in Chelentis vs. Luckenbach S. S. Co., 247 U. S., 372, 384:

> "The distinction between rights and remedies is fundamental. A right is a well-founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. Bouvier's Law Dictionary. Plainly, we think, under the saving clause a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common-law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law."

This language this court set out and approved in the case of Knickerbocker Ice Co. vs. Stewart, 253 U. S., 149, 159, saying:

> "Thus we distinctly approved the view that the original saving clause conferred no substantive rights and did not authorize the states to do so. It referred only to remedies, and to the extent specified permitted continued enforcement by the state courts of rights and obligations founded on maritime law."

For such a limitation of liability it is not necessary that there be express statutory authority fixing the measure of liability for injuries sustained by a seaman in the performance of a maritime contract. In Tullock vs. Mulvane, 184 U. S. 497, an action had been brought upon an injunction bond executed in an equity cause pending in a Federal court. The injunction bond was sued upon in a state court of Kansas. Under the local law the plaintiff was entitled to damages for attorney's fees expended by him in the proceeding in which the injunction was issued. The Kansas court permitted a recovery for such attorney's fees, contrary to the rules determining the measure of damages or recovery upon an injunction bond in the Federal courts. There was no statutory regulation upon the subject of injunction bonds in the Federal courts but the authority of the Federal courts in establishing the rule as to measure of damages was an authority exercised under the laws of the United States. This court held that the amount of the attorney's fees could not be recovered even in a state court. The reasoning in that case is clearly applicable to the facts in this case. The court said,

> "The test is not the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it." (510)

The trial court in its instructions completely disregarded the principles of maritime law and treated the case as though the damages were to be determined according to common law principles (as will be developed later in this brief). The Supreme Court of the State of Washington erred in its interpretation of the maritime law, but apparently proceeded upon the theory of the petitioner (p. 163) that the respondent could recover no greater damages in a common law action in the State court than those allowed by maritime law.

(2) Admiralty would have had jurisdiction since Sandanger was a seaman.

In order to entitle the petitioner to the immunity claimed by it, this cause must be one over which admiralty would have jurisdiction, which would necessitate that respondent be engaged in a maritime employment at the time his injuries were received. It is the contention of the petitioner that respondent was so engaged.

That he was a member of the crew of the boat upon which he was injured and was engaged in part of his duties as such member of the crew when he received his injuries was pleaded in his complaint and referred to a number of times during the trial of the case, and seems to have been admitted without question (pp. 2, 3, 181). The respondent's own testimony is that at the time of his injuries he was acting under orders from the captain of the

boat (p. 183). He was performing services which were obviously in furtherance of the enterprise in which the boat was engaged.

This position was admitted without discussion by the Supreme Court of the State of Washington in its opinion (p. 163) where it says:

> "It does seem that respondent's employment and service on the day in question was maritime in its nature. We shall so assume in our disposition of the case, without further discussion of that question.
>
> The Minna, 11 Fed. 759;
> Saylor v. Taylor, 77 Fed. 476;
> Lawrence v. Flatboat, 84 Fed. 200;
> Domenico v. Alaska Packers Ass'n., 112 Fed. 554;
> The J. S. Warren, 175 Fed. 314;
> The Virginia Belle, 204 Fed. 692;
> North Alaska Salmon Co. v. Larsen, 220 Fed. 93."

Being a seaman under the decisions of the above cases it follows that admiralty would have exclusive jurisdiction over respondent's cause, except for the saving clause in Sec. 24 of the Judicial Code, *supra*, which saves to suitors of admiralty jurisdiction the right of a common-law remedy where the common-law is competent to give it, but which does not give a right to any damages not allowed by maritime law.

(3) By Maritime Law, for the injuries to Sandanger the Carlisle Packing Company was liable only to the extent of Sandanger's wages, maintenance and cure, unless his injury was received in consequence of the unseaworthiness of the ship or a failure to supply and keep in order the proper appliances appurtenant to the ship.

As stated by the Supreme Court of Washington (p. 163) the petitioner's contention is that the principles of maritime law as announced by Mr. Justice Brown in The Osceola, 189 U. S., 158, 175, are controlling, wherein he says:

> "Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:
>
> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> "2. That the vessel and her owners are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.
>
> "3. That all the members of the crew, ex-

> cept perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
>
> "4. That the seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident."

which principles were re-adopted by this court in the cases of:

> Southern Pacific vs. Jensen, 244 U. S., 205;
> Chelentis vs. Luckenbach S. S. Co., 247 U. S., 372;
> Knickerbocker Ice Co. vs. Stewart, 253 U. S., 149;

(4) Sandanger should not have recovered more than his maintenance and cure for negligence of the master.

The instruction to the jury set forth in the Fourth Specification of Error, was directly contrary to the law as set forth in the Fourth Proposition of Mr. Justice Brown in The Osceola, *supra*. The court in effect charged the jury that if the neg-

ligence was entirely that of the master, Sandanger could recover full compensation for his injuries. This instruction had nothing to do with the question of whether or not the ship was "unseaworthy." Under this instruction and the instruction contained in the Fifth Specification of Error, the jury did not have to consider the seaworthiness of the ship at all, but, in order to hold the Carlisle Packing Company to full indemnity, merely had to find that the master had been negligent in filling the can with gasoline when he might have "by a simple test found out whether it was coal oil or gasoline."

These instructions were squarely in conflict with The Osceola, *supra*, and with the case of Chelentis v. Luckenbach S. S. Co., 247 U. S. 372, where it was held that a seaman, who was washed overboard and his leg broken as a result of a negligent and improvident order given by a superior officer, could not recover damages at all as for negligence.

(5) The presence of gasoline in a can supposed to contain kerosene and used to help light a galley fire, would not render the ship unseaworthy, nor would it be a failure to supply and keep in order the proper appliances appurtenant to the ship.

The petitioner asked for an instruction on the question of seaworthiness which would have left it to the jury to say whether the vessel was reasonably fit to perform the service undertaken by the

master, but this instruction was denied (Eighth Specification of Error). It appears, therefore that the question of seaworthiness did not go to the jury at all, and that they decided the case solely on the question of the master's negligence, under the instruction contained in the Fourth Specification of Error.

The Supreme Court of the State of Washington affirmed the judgment on the ground that "respondent's recovery in this case may be sustained upon the theory that his injuries were received in consequence of the unseaworthiness of the boat upon which he was working" (p. 166), by reason of having gasoline in the can instead of kerosene. This holding is based on a proposition which never was before the jury. It is urged by the petitioner that there should have been an instructed verdict for $175, the agreed expense of cure, since there was no evidence of unseaworthiness, but if the court believed there was evidence of unseaworthiness an issue of fact was raised which should have been sent to the jury under proper instructions.

The theory of the Supreme Court of Washington goes far beyond any definition of "unseaworthiness" announced by the courts. To say that a ship is unseaworthy because there is gasoline in a coal oil can used to help light the galley fire, is simply a corruption of the word unseaworthy. Nor is the can "one of the proper appliances appurtenant to the ship," to use the words of the court in The Osceola, *supra*.

In The New York, 204 Fed. 764, the libelant was injured while filling oil cups in the engine room by his overalls catching in an uncovered revolving shaft. It was held that the steamer was not unseaworthy although the shaft was not boxed in.

In The Santa Clara, 206 Fed. 179, it was held that the failure to provide lights or hand-rails or other protection around the hatch did not render the ship unseaworthy.

In the case of Hanrahan vs. Pacific Transport Co., 262 Fed., 951, it was expressly held that the ship was not unseaworthy because of a temporary absence of a hand-rail while she was lying alongside the wharf discharging cargo, so as to entitle a seaman injured thereby to recover damages. In that case the plaintiff was a member of the crew, as in this case. The vessel being in port and face to the pier, plaintiff returned at night from shore leave, and while walking on the upper deck to his quarters, fell overboard, suffering personal injuries for which he brought his common law action. The reason why he was injured was that by the negligence of the ship's officers a certain hand-rail was not in place. This rail consisted of wire rope passing through stanchions, which were insertable in sockets built into the deck. It was erected to take the place of a bulwark. The court said that the jury might have found that the plaintiff's injuries were caused or contributed to by the absence of the hand-rail. Plaintiff asked to go to the jury on the theory that the vessel was unseaworthy by reason of the

failure of those in charge of her to maintain the hand-rail in place.

The Circuit Court said:

> "Every allegation of fact made by the plaintiff has been assumed, yet we hold that no jury could on such facts declare the ship unseaworthy * * * The contention confounds seaworthiness and safety, if not seaworthiness and comfort."

and affirmed the decision of the District Court directing a verdict for the defendant. Certiorari was denied, 252 U. S. 579, and this decision can fairly be considered as a final pronouncement on the question.

In The Santa Barbara, 263 Fed. 369, the libelant was ordered to put up certain ropes and chains which were used in connection with cleaning the smokestack. In doing this he was injured. The contention was that the ship was unseaworthy because the ropes and chains were not already in position. The case was dismissed, the court saying:

> "The chains were supplied; whether unseaworthiness would have resulted had that not been done is a matter not before us. Whether they should be 'maintained', or retained in the pulleys and left stretched along the guys contributing weight without strength while the steamer tossed at sea is a matter wholly with-

> in the discretion of the Captain. If that discretion was unwisely exercised, it was at most no more than his personal negligence in handling or mishandling good and proper appliances duly furnished by the owners. As nothing was defective in fit or materials and everything suggested as proper even by libelant's proctor, was provided for the ship, we hold that no unseaworthiness was shown." (p. 370.)

The analogy of this case to the case at bar is striking. In the case at bar if the owners provided both gasoline and kerosene and designated them properly or in a reasonably prudent manner, and the master could by a simple test have found out whether he was filling the can with gasoline or kerosene, (see Fourth Specification of Error), then it was a question of personal negligence in mishandling good and proper appliances duly furnished by the owner, and no unseaworthiness was shown.

(6) The Carlisle Packing Company could in no event be liable beyond the value of the vessel and the freight money for the current voyage.

There was error in refusing to instruct the jury in the alternative that the petitioner would not be liable for obligations arising on board a ship beyond the value of the vessel and the freight money

for the current voyage during which the debt or liability arose (Seventh Specification of Error).

This specification of error is predicated upon the theory that the court having refused to instruct the jury that the petitioner would be liable only for the balance remaining unpaid on the expenses of respondent's cure admitted to be $175.00, it should have instructed the jury in the alternative that petitioner's liability in any event should be limited to the value of the boat on which the injury occurred plus the freight money, if any, for the current voyage during which the liability arose, which was in this case undisputed to be not in excess of $1500.00 (p. 338).

Section 4283 R. S. provides:

> "The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel or for any loss, damage or injury by collision or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

Section 4289 R. S. provides:

"The provisions of the seven preceding sections and of section eighteen of an act entitled, 'An Act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes,' Approved June twenty-sixth, eighteen hundred and eighty-four, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal-boats, barges, and lighters."

Under these sections it is believed that it can not be disputed that the boat upon which the accident occurred is one for which the owners are entitled to claim the limitations of liability provided therein.

That a motorboat comes within the meaning of the word "vessel" has been specifically held in the case of *The Alola*, 228 Fed. 1006. In that case an action was brought against the owner of the boat, a gasoline motorboat 45 feet 9 inches long with a 9 foot 8 inch beam, for damages resulting from the motorboat colliding with a rowboat, resulting in the death of one of the occupants of the rowboat. The court in its opinion says:

"The conclusion of the court on the testimony adduced is that the respondent is en-

titled to the benefit of the limitation of liability claimed by him."

That this statute limiting liability applies to cases of personal injury and death has been repeatedly held:

Butler v. Boston & Savannah Steamship Co., 130 U. S. 527.
Deslions vs. La Compagne Generale Transatlantique, 210 U. S. 120.
Ocean Steam Navigation Co. vs. Mellor, 233 U. S. 732.
White vs. Island Transportation Co., 233 U. S. 350.

That the limitation of liability prescribed extends to personal injuries of seamen has been specifically held. Craig v. Continental Ins. Co., 141 U. S. 638.

The statutory limitation of liability applies if the acts causing liability were done without the privity or knowledge of the owner of the vessel. When the owner of the vessel is a corporation this Court has declared that "the privity or knowledge must be that of the managing officers of the corporation." Craig v. Continental Ins. Co., 141 U. S. 638, 647. There is no evidence in this case that the managing officers of the petitioner were in any way privy to or had any knowledge of the acts upon which the liability of petitioner is based.

Therefore, even if the Court should hold that under maritime law the petitioner is liable in this case for the negligence of the master of the vessel we submit that the amount of such liability cannot, under the provisions of the statute referred to above, exceed the value of the vessel and her freight then pending.

CONCLUSION.

It is, therefore, urged that the decision of the Supreme Court of the State of Washington be reversed, with instructions that judgment be entered for the plaintiff below in the sum of One Hundred Seventy-five Dollars ($175).

Respectfully submitted,

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